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Supreme Court of the United States

October Term, 1952

No. 327

KINSTON TOBACCO BOARD OF TRADE, INCORPORATED, ET AL,

Petitioners

v.

LIGGETT AND MYERS TOBACCO COMPANY, A CORPORATION, ET AL,

Respondents

Brief on Behalf of Respondent, Kinston Tobacco Company, Incorporated, in Opposition to the Petition For Writ of Certiorari

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Brief on Behalf of Respondent, Kinston Tobacco Company, Incorporated, in Opposition to the Petition For Writ of Certiorari

This brief is filed on behalf of the respondent, Kinston Tobacco Company, Inc., in opposition to the granting of the writ of *certiorari* prayed for in the petition for the reason that the case presents no Federal question decided by the Court below.

Statement of the Case

The petitioner, Kinston Tobacco, Board of Trade, Inc., is a corporation organized under the authority of a statute of the State of North Carolina, G.S. § 106-465, for the purpose of making reasonable rules and regulations for the economic and efficient handling of sales of leaf tobacco at

auction on the warehouse floors of the Kinston Tobacco market. Its membership is composed of tobacco warehousemen and purchasers of leaf tobacco.

The petitioner, through its appropriate committee, created a five-sale market for 1949, and subsequent years and attempted to direct that each buyer of leaf tobacco upon the Kinston market should participate upon the fifth sale in substantially the same manner each was then participating upon the four sale market. When this respondent, as well as others, in the exercise of business judgment as to its needs and facilities available to it, failed to place buyers upon the fifth sale in compliance with the regulation of the plaintiff, the petitioner instituted this suit for the purpose of securing a mandatory injunction requiring this respondent and others to comply with the regulation of the petitioner directing participation in the fifth sale.

On September 28, 1951, on the basis of the verified, complaint filed by the petitioner, the Superior Court of Lenoir County, North Carolina, issued a temporary mandatory injunction directing the respondents to comply with the regulation of the petitioner. Process was issued and the hearing upon the temporary mandatory injunction was set for October 13, 1951. On October 1, 1951, the respondents having failed to comply with the temporary order in the belief that the court was without power to compel them to participate upon the fifth sale, each was cited for contempt for failure to comply with the courts order. The citation was returnable on October 6, 1951. Upon the return of the order to show cause, all of the defendants, the respondents here, appeared and demurred *ore tenus* to the complaint and with the permission of the court later filed written demurrers. Numerous other pleadings were filed by the defendants, all directed to the dismissal of the suit. The contempt citation

was dismissed at the hearing, but all special appearances of the defendants were overruled, the demurrers *ore tenus* denied and an order entered continuing the temporary mandatory injunction to the final hearing. From that order all defendants appealed immediately to the Supreme Court of North Carolina.

On June 11, 1952, the Supreme Court of North Carolina reversed the order of the Superior Court of Lenoir County and entered its judgment directing that the demurrers *ore tenus* be sustained and that the action be dismissed. It is from this decision of the Supreme Court of North Carolina that the petitioner seeks a writ of *Certiorari*. The opinion of the Supreme Court of North Carolina (R.P. 347 and following) is not yet reported in the official North Carolina State Reports but is reported in the advance sheets of the South Eastern Reporter for July 10, 1952, 71 S. E. 2d 21.

The Questions Presented

The petitioner, in an attempt to invoke the jurisdiction of this Court asserts that three questions are presented. Of these the first presents no Federal question at all, and the second and third are in fact not presented by this case since the Supreme Court of North Carolina has decided that, as a matter of North Carolina law, the Kinston Tobacco Board of Trade, Inc., has not been authorized to establish a fifth sale on the Kinston Market and require the respondents to participate thereon.

Argument

The Supreme Court of North Carolina, after stating that the primary relief sought in this action is a mandatory injunction requiring the defendants to the action brought by Kinston Tobacco Board of Trade, Inc. to comply with

the rule promulgated by that corporate plaintiff directing participation in the fifth sale, said:

> "* * * This raises two questions: (1) Does a mandatory injunction lie, under the facts in this case? (2) Is the Kinston Tobacco Board of Trade, Inc., authorized by law to establish a fifth sale on the Kinston market and require that each of the defendants assign buyers, with instructions to bid and purchase, on the fifth sale substantially the same quantity of tobacco at substantially the same price as each had theretofore purchased upon each of the four sales theretofore conducted upon said market' ".

Both of these questions, the only questions considered by the North Carolina Supreme Court, were answered in the negative, the decision in both instances being based upon North Carolina law and not upon principles arising under the Constitution, laws or treaties of The United States.

With respect to the first question, one involving simply a matter of procedural remedies available under North Carolina law, the Court said that while a mandatory injunction has a proper and necessary place in the administration of justice an examination of the available authorities fails to disclose any case wherein such a process has been used to establish an entirely new status, adding:

> "* * * Such a remedy is available and useful to restore a status quo, but nowhere employed to enforce an individual or private corporation to do something entirely beyond the scope of his business judgment and beyond the range of his own volition. Clinton Dunn Telephone Co. v. Carolina Telephone Co., 159 N. C. 9, 74 SE 636; Leaksville Woolen Mills v. Spray Water Power & Land Co., 183 N.C. 511, 112 SE 24; Keys v. Alligood, 178 N.C. 16, 100 SE 113."

On the merits of the case, the Supreme Court of North Carolina stated that the corporate plaintiff has no authority to legislate and can create no duty where the law creates none. It held that no authority to promulgate the regulation in question had been given to the Kinston Tobacco Board of Trade, Inc., saying:

> "The statute under which the corporate plaintiff is organized is silent upon the question of the number of sales and prescribes no standard by which the number of sales may be determined. Therefore, in the absence of an agreement, either express or implied, the plaintiff has no right to establish a fifth sale and require the defendants to purchase thereon. Hamlet Hospital & Training School for Nurses v. Joint Committee, 234 N. C. 673 68 SE 2d 862 concurring opinion by Barnhill J. Its authority is limited to the regulation of hours of sale, size of piles, and like details. *Neither the statute, G. S. §106-465, nor its charter vests it with the authority it here seeks to exercise.* In no event was the by-law adopted by it relating to a fifth sale binding on the defendants by virtue of their non-participating membership of the corporation or otherwise." (Italics supplied)

Thus the Supreme Court of North Carolina decided the only questions now open for consideration on the basis of principles governed entirely by North Carolina State law and the case, therefore, presents no Federal question for decision.

Conclusion

For the reasons stated it is submitted that the petitioner does not present a case wherein the Court below has decided a Federal question arising under the Constitution laws or

treaties of the United States and that no matter within the jurisdiction of this Court is presented.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF FOR RESPONDENT AMERICAN SUPPLIERS, INC. IN OPPOSITION

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Opinion Below

The opinion of the Supreme Court of North Carolina (Record, p. 347), filed June 11, 1952, is reported in the advance sheets of the North Carolina Supreme Court, Vol. 235 (No. VII), p. 737 (71 S. E. 2d. 21).

Jurisdiction

Jurisdiction is lacking under United States Code, Title 28, §1257, because the Supreme Court of North Carolina decided no federal question, nor was the decision of any federal question necessary to the determination of the cause.

Questions Presented

The questions presented in the case are clearly stated at the outset of the opinion of the Supreme Court of North Carolina, as follows:

> "The primary relief sought in this action is a mandatory injunction requiring the defendants to comply with the rules promulgated by the corporate plaintiff and its resolution of 24 September 1951. This raises two questions: (1) Does a mandatory injunction lie, under the facts in this case? (2) Is the Kinston Tobacco Board of Trade, Inc. authorized by law to establish a fifth sale on the Kinston market and require that each of the defendants assign buyers, with instructions to bid and purchase, on the fifth sale substantially the same quantity of tobacco at substantially the same price as each had theretofore purchased upon each of the four sales theretofore conducted upon said market?"

Those were the only questions presented, and the Supreme Court of North Carolina answered each one of them in the negative.

Question (3) posed in the petition for certiorari herein, viz.:

> "(3) Is the enforcement of the reasonable rules and regulations adopted for the government and

conduct of the Kinston tobacco market for the auction sale of leaf tobacco, a business affected with a public interest an invasion of any rights or privileges guaranteed to the respondents, or either of them, by the 5th and 14th amendments to the Constitution of the United States, or so as to affect inter-state commerce in violation of Sec. 8 of Article I, of the Constitution of the United States, vesting in the Congress of the United States the power to regulate commerce with foreign nations and among the several states and with the Indian Tribes, or an unconstitutional invasion of the rights of the respondents, or either of them, in the regulation and conduct of their respective businesses, or the denial of any other right guaranteed to them, or either of them, under the constitution and laws of the United States of America, or the State of North Carolina, or the taking of property of the respondents, or either of them, without due process of law, or deny to either of the defendants the equal protection of the law, in violation of the 5th and 14th amendments to the Constitution of the United States of America?"

was not raised by the petitioner below nor passed on by the Court below.

Statute Involved

The only statute involved was Chapter 106, Section 465 of the General Statutes of North Carolina as follows:

> "Tobacco warehousemen and the purchasers of leaf tobacco, at auction, on warehouse floors, are hereby authorized to organize, either as non-stock corporations, or voluntary associations, tobacco boards of trade in the several towns and cities in

North Carolina in which leaf tobacco is sold on warehouse floors, at auction.

"Such tobacco boards of trade as may now exist, or which may hereafter be organized, are authorized to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors in the several towns and cities in North Carolina in which an auction market is situated.

"The tobacco boards of trade in the several towns and cities in North Carolina are authorized to require as a condition to membership therein the applicants to pay a reasonable membership fee and the following schedule of maximum fees shall be deemed reasonable, to-wit:

"A membership fee of fifty dollars ($50.00) in those towns in which less than three million pounds of tobacco was sold at auction between the dates of August 20, 1931, and May 1, 1932; a fee of one hundred dollars ($100.00) in those towns in which during said period of time more than three million and less than ten million pounds of tobacco was sold; a fee of one hundred fifty dollars ($150.00) in those towns in which during said period of time more than ten million and less than twenty-five million pounds of tobacco was sold; a fee of three hundred dollars ($300.00) in those towns in which during said period of time more than twenty-five million pounds of tobacco was sold.

"Membership, in good standing, in a local board of trade shall be deemed a reasonable requirement by such board of trade as a condition to participating in the business of operating a tobacco warehouse or the purchase of tobacco at auction therein.

"Membership in the several boards of trade may be divided into two categories:

"A. Warehousemen;

"B. Purchasers of leaf tobacco other than warehousemen.

"Purchasers of leaf tobacco may be: (1) Participating or (2) nonparticipating. The holder of a membership as a purchaser of leaf tobacco shall have the option of becoming, upon written notice to the board of trade, either a participating or a nonparticipating member. Individuals, partnerships, and/or corporations who are members of tobacco boards of trade, established under this section or coming within the provisions of this section, as nonparticipating members shall not participate in or have any voice or vote in the management, conduct, activities, allotment of sales time, and/or hours, the fixing of dates for the opening or closing of tobacco auction markets or in any other manner or respect. Individuals, partnerships, and/or corporations who are such nonparticipating members in any of the several tobacco boards of trade shall not be responsible or liable for any of the acts, omissions or commissions of the several tobacco boards of trade.

"It shall be unlawful and punishable as of a misdemeanor for any bidder or purchaser of tobacco upon warehouse floors to refuse to take and pay for any basket or baskets so bid off from the seller when the seller has or has not accepted the price offered by the purchaser or bidder of other baskets. Any person suspended or expelled from a tobacco board of trade under the provisions of this section may appeal from such suspension to the superior court of the county in which said board of trade is located.

"Nothing in this section shall authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade (1933, c. 268; 1951, c. 383).

Statement of the Case

Petitioner, Kinston Tobacco Board of Trade, Inc., is a corporation created under authority of the statute "for the purpose of making reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors of the Kinston tobacco market". Its membership is composed of tobacco warehousemen and purchasers of leaf tobacco, who may be either participating or nonparticipating members. This respondent is a nonparticipating member.

The Kinston tobacco market had been conducted as a four-sale market for many years and the respondents had attended each of these sales. In 1949 the Kinston Tobacco Board of Trade established a fifth sale on the Kinston market. The respondents did not attend the fifth sale that year or the next, but continued to buy at the other four sales.

On September 24, 1951, the Kinston Tobacco Board of Trade adopted a resolution that each buyer of tobacco on the Kinston market attending four sales be required to participate in all five sales with uniformity as to bidding and purchase of tobacco on each of the sales. The respondents declined to participate in the fifth sale.

Petitioner, on September 28, 1951, commenced this action in the Superior Court of Lenoir County, North Carolina, seeking a mandatory injunction to compel the

respondents to comply with the requirement of the Kinston Tobacco Board of Trade that they attend at such fifth sale and buy tobacco thereon. The Superior Court of Lenoir County granted a preliminary mandatory injunction directing respondents to participate in all five sales by placing a buyer or other agent or agency upon each with instructions and authority to bid and purchase tobacco on each of the five sales. Upon appeal to the Supreme Court of North Carolina, this was reversed, the mandatory injunction dissolved, respondents' demurrers sustained, and the action dismissed.

Argument

The Supreme Court of North Carolina decided no federal question. It decided only that, under the North Carolina statute involved, the Kinston Tobacco Board of Trade was not "authorized by law to establish a fifth sale on the Kinston market and require that each of the defendants assign buyers, with instructions to bid and purchase, on the fifth sale substantially the same quantity of tobacco at substantially the same price as each had theretofore purchased upon each of the four sales theretofore conducted upon said market".

That the decision involved only the application of North Carolina law appears from the following portion of the opinion (R. 351):

> "The statute under which the corporate plaintiff is organized is silent upon the question of the number of sales and prescribes no standard by which the number of sales may be determined. Therefore, in the absence of an agreement, either expressed or implied, the plaintiff has no right to establish a

> fifth sale and require the defendants to purchase thereon. Hamlet Hospital & Training School for Nurses v. Joint Committee, 234 N. C. 673, 68 S. E. 2d 862, concurring opinion by Barnhill, J. Its authority is limited to the regulation of hours of sale, size of piles, and like details. Neither the statute, G. S. §106-465, nor its charter vests it with the authority it here seeks to exercise. In no event was the bylaw adopted by it relating to a fifth sale binding on defendants by virtue of their nonparticipating membership in the corporation or otherwise."

Petitioner raised no federal question below. Respondents did contend that if the North Carolina statute were construed to authorize petitioner to compel buyers to attend and participate on the fifth sale, the statute would be unconstitutional. But the Supreme Court of North Carolina never reached that contention. It held that the statute did not confer any such authority.

The Supreme Court of North Carolina did not pass on the question stated as question (3) in the petition herein or any question involving in any way any title, right, privilege or immunity specially set up or claimed by the petitioner under the Constitution, treaties or statutes of, or Commission held or exercised under, the United States (28 United States Code, §1257).

Since the non-federal grounds for the decision of the Supreme Court of North Carolina are completely adequate to support its judgment in all respects, there can be no review by this Court. *Young* v. *Ragen,* 337 U. S. 235, 238; see also *Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U. S. 206, 212-213; *Hammerstein* v. *Superior Court of California,* 340 U. S. 622, 623.

CONCLUSION

The petition for a writ of certiorari should be dismissed.

Respectfully submitted,

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Dated: October, 1952.